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No. 86-1570

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

LAWRENCE MCKINLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prosecution was barred by the statute of limitations, which expired while his indictment was under seal.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a) is reported at 808 F.2d 60.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1986. A petition for rehearing was denied on January 28, 1987 (Pet. App. 2a-3a). The petition for a writ of certiorari was filed on March 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 5), and conspiring to distribute and possess with intent to distribute

marijuana, in violation of 21 U.S.C. 846 (Count 3).[1] He was sentenced to three years' imprisonment on Count 5, to be followed by a ten-year special parole term, and to five years' probation on Count 3.

1. The original seven-count indictment in this case was returned in October 1982. Petitioner was one of seven defendants charged with various marijuana-related offenses.[2] At the time the indictment was filed, the prosecutor appeared before a magistrate and requested that the indictment be sealed pursuant to Fed. R. Crim. P. 6(e)(4). He represented that the drug transactions at issue involved millions of dollars and that defendant Mitchell had access to large sums of money both in this country and abroad and that he might flee if he learned of the indictment. The magistrate granted the government's request.[3]

A superseding indictment was returned in January 1983. In addition to realleging the seven marijuana counts, it also charged co-defendant Mitchell with two counts of filing false income tax returns. The government moved to seal the superseding indictment. Relying on the representations made at the time of the original indictment, the prosecutor stated that unless the superseding indictment was

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[1] At the close of the government's case, the trial court granted petitioner's motion for judgment of acquittal as to three counts; the jury acquitted him on two other counts.

[2] The other defendants were Phillip Anthony, William Sharp, Jeff Blake, Robert Lowery Logan, Henry "Gene" Todd, and David Mitchell. Anthony, Sharp, Blake, Logan, and Todd entered guilty pleas to various counts of a superseding indictment. Mitchell was tried and acquitted on two tax counts contained in the superseding indictment; the drug charges against him were dismissed by the district court on collateral estoppel grounds.

[3] This statement of facts is taken from the government's brief in the court of appeals and from the opinion in *United States* v. *Mitchell*, 769 F.2d 1544 (11th Cir. 1985), certs. denied, No. 85-5746 (Jan. 13, 1986), and No. 85-6106 (Feb. 24, 1986), which involved related legal issues raised by five of petitioner's co-defendants.

sealed, the defendants might flee if they learned of the charges. The magistrate granted that motion as well.

Co-defendant Mitchell subsequently learned of the indictment, and on February 6, 1984, he surrendered to the authorities. Four other co-defendants also surrendered or were arrested, but petitioner and co-defendant Sharp remained fugitives.

The five co-defendants in custody filed a motion to dismiss the indictment, claiming, inter alia, that the statute of limitations as to the marijuana counts had expired while the indictment was sealed and that they had been denied their right to a speedy trial. Following an evidentiary hearing,[4] the magistrate recommended against dismissal. The district court, after holding a further hearing, dismissed the seven drug counts as to the five defendants.[5] It found that the government had made insufficient efforts to locate the defendants following the return of the indictments, and it held that prejudice should be presumed as a matter of law because the indictment had remained sealed beyond the limitations period.

The government appealed, and the court of appeals reversed and remanded for further proceedings. *United States* v. *Mitchell,* 769 F.2d 1544 (11th Cir. 1985), cert. denied, No. 85-5746 (Jan. 13, 1986) and No. 85-6106

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[4] At the hearing, the prosecutor testified about why the government had asked that the indictments be sealed. A principal concern was that three of the defendants (Mitchell, Sharp, and petitioner) were likely to flee. The prosecutor noted that both petitioner and Mitchell had easy access to overseas travel and to cash resources that had been secreted outside the country. He detailed the government's efforts to locate the five co-defendants, but because petitioner and Sharp were still fugitives, he declined to reveal in open court the efforts the government had made to locate those two defendants.

[5] The court did not dismiss the two tax-related counts against Mitchell because the superseding indictment charging those counts had been unsealed within the relevant statute of limitations period.

(Feb. 24, 1986). The court found that the district court had erred in presuming prejudice simply because the statute of limitations had expired while the indictment was under seal. Without disturbing the district court's finding concerning the government's lack of good faith efforts to locate the defendants, the court of appeals held that the defendants were required to show actual prejudice as a result of the delay. 769 F.2d at 1547-1548.

2. In May 1985, while the government's appeal in *Mitchell* was pending, petitioner was arrested in Fort Lauderdale, Florida. He subsequently moved for dismissal of the indictment against him, claiming that the district court's earlier ruling involving his co-defendants applied equally to him.

At the hearing before the magistrate on petitioner's motion, the government presented evidence concerning the circumstances surrounding petitioner's arrest and the efforts the government had made to locate him while the indictment was under seal. That evidence revealed, inter alia, that when petitioner was arrested, he had in his possession numerous pieces of identification in the name "Lawrence W. Bishop," some of which contained petitioner's photograph, and that he also had an airline ticket and a boat owner's association card in the name "Wayne Bishop." In addition, in April or May 1984 petitioner told his girlfriend that (1) there was an indictment outstanding against him in Atlanta; (2) he did not want to surrender to the authorities because he wanted to avoid being fingerprinted or paying attorney's fees; (3) the authorities did not have much evidence against him; and (4) his co-defendants already had "gotten off."[6]

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[6] The evidence also showed that the Drug Enforcement Administration was unable to pursue several conventional investigative techniques to locate petitioner because it did not have his date of birth, social security number, or other specific biographical data. Moreover, the DEA made other efforts to locate petitioner, such as contacting

3. The court of appeals rendered its decision in *Mitchell* before the magistrate had issued his recommendation in the present case. In light of court's remand in *Mitchell,* the magistrate referred petitioner's motion to dismiss to the district court for resolution.

At a hearing before the district court, petitioner presented evidence on the prejudice he allegedly suffered because of the delay in his trial.[7] He claimed, among other things, that while the indictment was under seal, he destroyed various business and travel records that would have shown that he was not in the places where the offenses were alleged to have occurred on the dates set forth in the indictment (Pet. App. 8a-9a).

Following petitioner's conviction, the district court denied his motion to dismiss the indictment (Pet. App. 4a-11a). It held that petitioner had not satisfied his burden of showing " 'substantial, irreparable, actual prejudice' because of the sealing of the indictment" (*id.* at 11a). According to the court, there was no way of knowing whether the destroyed documents could have placed petitioner somewhere other than the locations alleged in the indictment, and it was therefore "highly questionable" whether the documents would have helped him (*id.* at 10a). The court pointed out that there were "no tax returns or credit card statements or other items that might independently corroborate" petitioner's assertions concerning the destroyed documents (*ibid.*). Moreover, the court

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police departments in various states, speaking with informants, and tracking down various prior employment positions held by petitioner. All such attempts were unsuccessful, however, until the tip from petitioner's girlfriend led the DEA to petitioner in Fort Lauderdale.

[7] Petitioner's co-defendants refused to present any testimony on the issue of prejudice; the district court therefore denied their motions to dismiss.

noted (*id.* at 10a-11a) that the factual issues of whether the documents would have helped petitioner and whether he would have saved them had the indictment not been sealed turned largely upon his credibility, which had been successfully impeached by the government.

The court of appeals affirmed without opinion (Pet. App. 1a) and later denied rehearing en banc (*id.* at 2a-3a).

ARGUMENT

Petitioner contends (Pet. 10-25) that because the statute of limitations expired while his indictment was under seal, he should not have been required to show substantial, actual prejudice in order to prevail on his motion to dismiss. Petitioner does not contend that the decision below conflicts with any decision of this Court or of any other court of appeals. Rather, he argues that the standard adopted by the courts that have addressed the issue is erroneous. Contrary to petitioner's contention, however, the courts have adopted the correct standard. Review by this Court is therefore not warranted.

Under Fed. R. Crim. P. 6(e)(4), the government may request the sealing of an indictment for a period that extends beyond the statute of limitations. See, *e.g.*, *United States* v. *Ramey*, 791 F.2d 317, 320-321 (4th Cir. 1986); *United States* v. *Edwards*, 777 F.2d 644, 647-648 (11th Cir. 1985), cert. denied, No. 85-1562 (Apr. 21, 1986). An indictment sealed pursuant to Rule 6(e)(4) is timely even though the defendant is not arrested and the indictment is not made public until after the end of the limitations period. See, *e.g.*, *Edwards*, 777 F.2d at 647 (citing cases).

The courts have repeatedly held that when the prosecution establishes a legitimate need for sealing an indictment, and the indictment remains sealed beyond the limitations period, the defendant is not entitled to dismissal absent a showing of actual and substantial prejudice from the delay.

See, *e.g.*, *United States* v. *Srulowitz,* No. 86-1446 (2d Cir. May 15, 1987), slip op. 3020; *Ramey,* 791 F.2d at 322; *Edwards,* 777 F.2d at 649; *United States* v. *Southland Corp.,* 760 F.2d 1366, 1378-1381 (2d Cir. 1985), cert. denied, No. 84-1951 (Oct. 7, 1985); *United States* v. *Muse,* 633 F.2d 1041, 1043 (2d Cir. 1980), cert. denied, 450 U.S. 984 (1981); see also 8 J. Moore, *Federal Practice* ¶ 6.02[2][d], at 6-40 to 6-40.1 & n.55 (2d ed. 1987); 1 C. Wright, *Federal Practice and Procedure* § 110, at 306-307 & n.30 (2d ed. 1982). This standard provides relief for a defendant who has been harmed by the delay but otherwise enables the government to obtain sealed indictments without fear of later dismissal. See generally *Southland,* 760 F.2d at 1380.[8]

Notwithstanding these authorities, petitioner relies on cases holding that arrest warrants and parole violator warrants must be executed in a timely fashion and argues (Pet. 19-20) that if the government delays unreasonably in unsealing an indictment, the indictment should be dismissed even if the defendant has not suffered prejudice. Petitioner's argument lacks merit as it virtually ignores the important government interests at stake.

A major purpose of sealing indictments is to prevent defendants "from securing an unwarranted benefit from the statute of limitations by continuing to avoid arrest until the limitations period ha[s] run." *Muse,* 633 F.2d at 1043. If this objective is to be carried out, "[t]he Government should be able, except in the most extraordinary cases, to rely on [the] decision [of a magistrate to seal an

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[8] Petitioner errs in contending (Pet. 11) that this standard results in "an abdication of [the] judicial function to the prosecuting attorney." Only a judicial officer can order the sealing of an indictment. Moreover, the court can later order dismissal of the indictment if it determines that the sealing beyond the statute of limitations period has resulted in actual prejudice to the defendant.

indictment] rather than risk dismissal * * * at a time when reindictment is by hypothesis impossible." *Southland,* 760 F.2d at 1380. Accordingly, the courts have correctly recognized that "the defendant's interests are adequately protected by permitting him to secure dismissal only when he can show prejudice * * *." *Muse,* 633 F.2d at 1043.

In any event, petitioner cannot prevail even under his own proposed standard.[9] At the hearing on petitioner's motion to dismiss, the magistrate heard testimony concerning the steps the government had taken to locate and apprehend petitioner. According to that testimony, the government received various leads concerning petitioner's whereabouts, but normal investigative channels were foreclosed because the government did not have petitioner's date of birth, social security number, or other personal data. When petitioner was ultimately located, he had in his possession numerous false identification documents. Moreover, petitioner confirmed in his statements to his girlfriend that he was seeking to avoid arrest on the present charges. Under these circumstances, it is clear that the continued sealing of the indictment was justified by petitioner's own efforts to evade apprehension.[10]

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[9] The district court's finding in the co-defendants' case that the government did not make a good faith effort to locate the defendants while the indictment was under seal is not binding with regard to petitioner. At the hearing on those motions, to which petitioner was not a party, the co-defendants testified concerning their whereabouts during the period in question, showing that they could easily have been found and arrested. By contrast, petitioner and Sharp remained fugitives at that time; in addition, during the hearing on the co-defendants' dismissal motions, the government explained that it could not describe in open court the details of its attempts to apprehend petitioner, since to do so would jeopardize its arrest efforts.

[10] Petitioner contends (Pet. 21) that the only reason presented to the magistrate in support of the government's motion to seal the indictment was the need to assure the arrest of co-defendant Mitchell, and that following Mitchell's arrest, there was no further justification for

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JUNE 1987

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keeping the indictment under seal. That claim is erroneous; the prosecutor, in requesting that the superseding indictment be placed under seal, indicated that the defendants—not just Mitchell—might flee. Moreover, during the hearings on the co-defendants' motion to dismiss, the prosecutor testified that the government had sought the sealing of the indictment because of its concern that Mitchell, Sharp, and petitioner would flee unless they were arrested simultaneously. In light of petitioner's possession of false identification documents and his statements to his girlfriend that he was evading arrest, the government's concerns turned out to be fully justified.

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